**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| Connect America Fund | ) | WC Docket No. 10-90 |
| Developing a Unified Intercarrier Compensation Regime | ) | CC Docket No. 01-92 |

# REPLY COMMENTS OF AT&T ON CENTURYLINK PETITION FOR DECLARATORY RULING


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Pursuant to the Public Notice released by the Federal Communications Commission ("Commission") on May 18, 2018, AT&T Services, Inc. ("AT&T"), on behalf of itself and its affiliates, respectfully submits these reply comments in response to the comments filed on the Petition for Declaratory Ruling filed by CenturyLink Inc. ("CenturyLink").[1]

**INTRODUCTION AND SUMMARY**

Only two sets of comments support CenturyLink's Petition: Teliax and O1/Peerless. These comments, however, add virtually nothing new to the record. If anything, they complicate the Petition, because while CenturyLink (joined by Teliax) argues that the Petition should be granted based on a finding that interconnection is *not* a core function of end office switching (ignoring longstanding Commission and court precedents to the contrary), O1/Peerless concede that interconnection *is* essential, while arguing—without any success, and in contradiction to the D.C. Circuit—that over-the-top LEC-VoIP partnerships provide interconnection.

[1] Petition of CenturyLink for a Declaratory Ruling, *Connect America Fund, et al.*, WC Docket No. 10-90, *et al.*, at 2 (filed May 11, 2018) ("Petition" or "Pet."); Public Notice, *Pleading Cycle Established For CenturyLink Petition For Declaratory Ruling*, WC Docket Nos. 10-90; CC Docket No. 01-92, DA 18-517 (rel. May 18, 2018) ("Public Notice").

Accordingly, neither the Petition nor the comments provide the Commission with any more coherent rationale for allowing end office charges on over-the-top VoIP calls than the Commission's prior rationale, which the D.C. Circuit found arbitrary. *AT&T Corp. v. FCC*, 841 F.3d 1047 (D.C. Cir. 2016) ("*AT&T*"), *vacating and remanding*, Declaratory Ruling, *Connect America Fund*, 30 FCC Rcd. 1587 (2015) ("*Declaratory Ruling*"). Nor does the Petition or supporting comments provide any adequate responses to the many other problems that the D.C. Circuit identified in its decision, such as how to

(i) explain the passages in the *Transformation Order*[2] that "on their face" seem to "deny an over-the-top provider authority to charge end-office switching rates" (*id.* at 1054);

(ii) account for the Commission's precedents as to the "commonly understood meaning of end-office switching" and the Commission's "remarkably clear, even emphatic" statement that end office charges are authorized for LECs to recover the "substantial investment required to construct [] tangible connections" to their customers (*id.* at 1056);

(iii) "explain why VoIP-LECs' failure to provide interconnection is not fatal to the claim that they provide the functional equivalent of end office switching" (*id.*); or

(iv) "provide some distinctive 'functional equivalence' criterion" that supposedly took (*sub silentio*) the place of the established meanings developed in years of precedent (*id.*).

Based on the record now before the Commission, and the D.C. Circuit's decision in *AT&T*, the only lawful and rational response to the Petition is to deny it, and re-confirm what has been true since at least 2011: LECs and their VoIP partners do not provide interconnection to loops on over-the-top VoIP calls, which is the core and distinguishing feature of end office switching, and thus these LECs are prohibited from tariffing, billing, or collecting end office switching charges on over-the-top VoIP calls.

[2] Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund et al.*, 26 FCC Rcd. 17663, ¶¶ 933-71 (2011) ("*Transformation Order*")

The commenters seek to inject two additional issues into this proceeding, but neither have merit. *First*, O1/Peerless argue that, if the Commission denies the Petition, the Commission should declare that its denial applies only prospectively, and that LEC-VoIP partnerships may bill and collect end office switching on over-the-top VoIP calls prior to that time. This relief would be unlawful and improper. As explained below, O1/Peerless point to no reasonably clear law on which they or other over-the-top VoIP providers could have reasonably relied when they billed end office charges, and any denial of the Petition will apply retroactively under governing law.

*Second*, Teliax and O1/Peerless seek a new rule that would require access customers to pay bills for end office charges (or, indeed, any billed tariffed charge), even when a LEC or its VoIP partners do not provide end office services. That makes no sense. In order to collect tariffed charges, a carrier necessarily must demonstrate that it *provided* the services in compliance with its tariff. When (as here) a dispute arises over the carrier's compliance with its tariff, the Commission has determined that LECs cannot insist on payment of disputed charges. As to over-the-top VoIP calls, IXCs did not engage in unlawful "self-help," but properly disputed the LECs' end office charges—which were not provided and not properly billed—and instead paid a tandem charge. That tandem charge is the maximum owed under the LECs' own tariffs and the Commission's rules. AT&T's decision to dispute, and, pending resolution of the dispute, to withhold payment of billed services it did not receive, was fully consistent with governing law and the filed tariff doctrine.

## I. THE COMMENTS PROVIDE NO SUPPORT FOR A RULING THAT END OFFICE SWITCHING CHARGES APPLY ON OVER-THE-TOP VoIP CALLS.

As AT&T explained in its opening comments, CenturyLink's Petition provides no grounds for interpreting the *Transformation Order* rules to permit over-the-top LEC-VoIP partnerships to charge end office switching charges. O1/Peerless and Teliax add nothing of substance to CenturyLink's arguments.

O1/Peerless mostly repeat the original, fatally flawed arguments that CLECs advanced in 2012-14. In its very first *ex parte* letters, legacy Level 3 and Bandwidth.com started with the premise that the Commission's *RAO Letter 21* established the eight essential features of an end office switch.[3] One of those functions, of course, was physical interconnection of loops to trunks—and thus Level 3's original submissions effectively conceded AT&T's foundational point that interconnection is an (and as the D.C. Circuit noted, *the*) essential feature of end office switching.[4] Level 3 and Bandwidth.com originally argued that over-the-top LEC-VoIP partnerships performed all eight of these functions, and specifically it argued that they performed the interconnection function by exchanging various "SIP" messages with end users over the Internet.[5]

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[3] *See*, *e.g.*, Letter from John T. Nakahata, *et al*., to Marlene H. Dortch, FCC, dated September 10, 2012, at 4 ("Level 3/Bandwidth.com 9/10/12 *Ex Parte*") (citing *Classification of Remote Central Office Equipment, Letter, Responsible Accounting Officer*, DA 92-1091, 7 FCC Rcd 5205 (Comm. Carrier Bureau 1992) ("*RAO Letter 21*")).

[4] *See AT&T*, 841 F.3d at 1051 ("In 1997, the Commission clarified [*RAO Letter 21*] by stating that out of the eight functions, interconnection, *i.e.*, the actual connection of lines and trunks, is the characteristic that distinguishes [end-office] switches from other central office equipment"); *see Petitions For Reconsideration and Applications For Review of RAO 21*, 12 FCC Rcd. 10061, ¶ 11 (1997) ("*RAO Recon Order*") ("interconnection, *i.e.*, *the actual connection of lines and trunks*, is the characteristic that distinguishes switches from other central office equipment" (emphasis added)).

[5] *See* Level 3/Bandwidth.com 9/10/12 *Ex Parte* at 7-8 & Attachment 1.

O1/Peerless repeat this argument almost verbatim, quoting a Peerless *ex parte* from 2014 at length and including a chart very similar to one Level 3 first filed in 2012.[6] In O1/Peerless's version, an over-the-top LEC-VoIP partnership performs the "Interconnection" function because the CLEC's "switch fabric establishes a call path" between the "ingress line/trunk" and the "egress line/trunk."[7] AT&T has repeatedly refuted these claims. Over-the-top LEC-VoIP partnerships do not create call paths (indeed, they typically are not aware of the end user's location), nor do they perform the physical work of connecting trunks to individual lines (or its functional equivalent). Indeed, the D.C. Circuit emphasized that "[o]ver-the-top VoIP providers do not connect directly to the last-mile transmission network" at all. *AT&T*, 841 F.3d at 1051. The exchange of SIP messages happens purely at the application layer over the Internet and is not remotely the functional equivalent of physical interconnection with loops.[8]

By 2015, virtually all parties had realized that CLECs would never be able to show that an over-the-top LEC-VoIP partnership performs the functional equivalent of interconnection, and

[6] *Id.* at 6-9; *cf.* Level 3/Bandwidth.com 9/10/12 *Ex Parte* at 11 & Attachment 1.

[7] *Id.* at 9 ("Interconnection" entry on Chart).

[8] *See* AT&T Comments at 21-23; Letter from David L. Lawson, Counsel for AT&T, to Marlene H. Dortch, FCC, dated January 17, 2013, at 11-15 ("AT&T 1/17/13 *Ex Parte*"). To the extent O1/Peerless are suggesting that the CLEC's "switch fabric" performs the function of interconnection to loops by establishing a "call path," that is clearly false. Most obviously, in the case of over-the-top LEC-VoIP partnerships, the CLEC is, at most, establishing a call path between an ingress *trunk* and an egress *trunk*—the LEC does not connect lines to trunks, as an end office does. Equally important, any claim of functional equivalence is foreclosed by the D.C. Circuit's *AT&T* decision. Every TDM switch in the call flow establishes a "call path" between its ingress and egress lines or trunks in the same manner as the CLEC's switch, and thus such functions cannot distinguish the CLEC's switch from any other switch in the call flow, or distinguish end office switches from tandem switches. *See, e.g., AT&T*, 841 F.3d at 1053 (rejecting call control functions as the distinguishing feature of end office switches because they are not unique to end office switches: "[b]ecause both tandem and end-office switching process 'intelligence associated with call set-up,' the *Declaratory Ruling*'s functional equivalence analysis fails to distinguish between them").

therefore end-office advocates' strategy ever since has been to argue that interconnection is not an essential feature of end office switching after all. Most notably, the Commission did not rely on the interconnection argument in the *Declaratory Ruling*: instead, it tried to pretend that "call control" functions were the essential feature that distinguished end office switching from other switches, and treated interconnection as irrelevant and "a mere technical exigency of TDM networks."[9] And even though the D.C. Circuit rejected this "shift from interconnection" as arbitrary, *AT&T*, 841 F.3d at 1052, CenturyLink's Petition continues to treat interconnection as irrelevant and tries to revive the *Declaratory Ruling*'s "call control" theory. O1/Peerless's concession that interconnection is in fact essential to end office switching is thus fatal to their (and CenturyLink's) argument, because as everyone else has effectively acknowledged, over-the-top LEC-VoIP partnerships simply do not perform the functional equivalent of interconnection.

Teliax, for its part, adopts CenturyLink's argument that end office switching is nothing but a set of signaling messages that perform call setup functions.[10] As AT&T showed in its opening comments, these "call control" theories are not sustainable.[11] At the end of the day, CenturyLink has not pointed to anything that would refute the D.C. Circuit's basic point that such call control

[9] The Commission adopted this approach even though, as the D.C. Circuit noted, interconnection had always been "the *sine qua non* of end office switching." *AT&T*, 841 F.3d at 1051 ("[t]he *Declaratory Ruling* . . . dismissed arguments based on [*RAO Letter 21*] as "necessarily tied to TDM-based technologies," and "treated interconnection, formerly the *sine qua non* of end-office switching, as a mere technical exigency of TDM networks and not an inherent function of end-office switching").

[10] Teliax Comments at 7-8 (adopting CenturyLink's Petition "and its supporting declaration from Adam Uzelac" as "sufficient evidence to support grant of the Petition as filed").

[11] *See* AT&T Comments at 21-23, 26-27; *see also id*. at 6-15.

functions do not distinguish end office switching from tandem switching.[12] Teliax's "additional technical and engineering facts and policy data" add nothing to CenturyLink's arguments.[13]

The CLECs' remaining arguments are frivolous. O1 and Peerless emphasize the fact that, in the *Transformation Order*, the Commission said it was "not persuaded that the Commission should draw additional distinctions among traffic associated with different types of VoIP services"—which O1 apparently interprets to mean that the Commission did not want to distinguish between the types of VoIP providers as to whether they could charge end office switching.[14] The Commission was actually making a completely different point: it chose to apply the rule to all VoIP-PSTN traffic, rather than craft separate rules for interconnected and non-

[12] *AT&T*, 841 F.3d at 1053 ("Because both tandem and end-office switching process 'intelligence associated with call set-up,' the *Declaratory Ruling*'s functional equivalence analysis fails to distinguish between them").

[13] For example, Teliax argues that end office switches differ from tandem switches in that carriers use end office switches to offer "calling features," such as cancelling Call Waiting during a call by pressing *70. Teliax Comments at 8. Such features are not part of the end office switching service (and indeed, many may be information services), and in all events no one would claim that such adjunct services constitute the essence of the end office switching service itself. Nor does the availability of such features change the fact that "interconnection, *i.e.*, the actual connection of lines and trunks," is the characteristic that has always been thought to be the "*sine qua non* of end-office switching." *AT&T*, 841 F.3d at 1051. Teliax also claims (at 9-10) that ISPs merely "pass[] undifferentiated packets through its network," but this misses the point. The key characteristic of end office switching is interconnection to loops, and over-the-top LEC-VoIP partnerships *do not perform* that function—and thus they do not provide end office switching. *See, e.g., id.* at 1056 ("That the customer is paying for the broadband interconnection doesn't support the conclusion that interconnection is unnecessary for end-office switching—it merely indicates that it is provided by a party other than a VoIP-LEC."). Teliax also asserts (at 10) that "TDM transmission aspects of the PSTN" are sometimes interconnected via an "IP enabled backbone network," but even if that is so, Teliax provides no facts to support the notion that a TDM carrier could ever charge end office switching when separated from its end user customer by an IP *backbone network* (rather than a loop)—indeed, the *YMax Order* has already flatly rejected that proposition. *AT&T Corp. v. YMax Commc'ns Corp.*, 26 FCC Rcd. 5742, ¶ 44 ("*YMax Order*").

[14] O1/Peerless Comments at 4-5 (quoting *Transformation Order* ¶ 954 n.1942).

interconnected VoIP services.[15] The rules thus apply to VoIP-PSTN traffic, but they also expressly distinguish between end office and tandem switching, *see* 47 C.F.R. §§ 51.903(d), (i), and they expressly permit a LEC to charge for either service only when the LEC and its VoIP partner provide the functional equivalent of that service—as the D.C. Circuit recognized. *AT&T*, 841 F.3d at 1049 ("the *Transformation Order* allow[s] a VoIP provider and its LEC partner . . . to charge for providing the 'functional equivalent' of end-office switching services, or tandem switching services, as the case might be").

O1/Peerless also ask the Commission (at 10-11) to "clarify" that its *YMax Order* did not hold that over-the-top VoIP providers do not perform the functional equivalent of end office switching. O1/Peerless again miss the point. To be sure, the D.C. Circuit said that the *YMax Order*, which was a tariff decision, does not automatically *control* (in any strict sense) how the *Transformation Order* rules are to be interpreted.[16] But the *YMax Order* has a strong precedential effect that does control how key terms in the rules are to be interpreted and applied.[17] As the D.C.

[15] The Commission made the comment in the context of considering whether it had the legal authority to extend its compensation rules to VoIP providers, and it decided that it could apply the rules to all VoIP-PSTN traffic partly because all such traffic would be exchanged between two carriers subject to the Commission's authority. *Transformation Order* ¶ 954 (rules can be lawfully applied to all VoIP-PSTN traffic because "the exchange of VoIP-PSTN traffic that is relevant to our intercarrier compensation regulations typically occurs between two telecommunications carriers, one or both of which are wholesale carrier partners of retail VoIP service providers," and "a different conclusion is [not] warranted in the context of other VoIP-PSTN traffic [*i.e.*, VoIP-PSTN traffic that does not meet the rules' definition of an interconnected VoIP service]").

[16] *AT&T*, 841 F.3d at 1056.

[17] *See, e.g.*, Pai Dissent, at 1617-18 & n.15 (finding no explanation that the network architecture at issue in *YMax* "differs at all from the network architecture" of other over-the-top VoIP providers); *id.* ("YMax and its VoIP partners were and are providing the exact same functions as the LECs and their VoIP partners that sought clarification here."); *id.* at 1618 n.22 ("the FCC indeed meant what it said in the *YMax Order*: Interconnecting virtual loops over the Internet is not the functional equivalent of end office switching"); O'Rielly Dissent, at 1620 ("even if the YMax decision narrowly applies to the particular language in YMax's tariff and the specific

Circuit acknowledged, the *YMax Order*, applying "common industry meanings," was "remarkably clear, even emphatic" in rejecting the notion that a LEC-VoIP partnership's equipment could be analogized to an end office switch with the worldwide Internet as its "loop." *AT&T*, 841 F.3d at 1056. The D.C. Circuit thus made clear that the *YMax Order* is important because it "represents the Commission's apparent understanding of the 'commonly understood meaning[]' of end-office switching around the time of the *Transformation Order*" and thereby presents a substantial "problem" for the Commission's position in the *Declaratory Ruling*.[18] For all of these reasons, as AT&T explained at length in its opening comments, the *YMax Order* is one of many Commission precedents that forecloses O1 and Peerless's position here.[19]

## II. THE OTHER RELIEF SOUGHT BY SOME COMMENTERS IS MERITLESS AND SHOULD BE DENIED.

Two commenters—Teliax and O1/Peerless—request additional relief, beyond that requested in CenturyLink's Petition. Their contentions have no merit, and the Commission should reject them.

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configuration of YMax's network architecture, it is a further link in a chain of decisions that show that functional equivalent has specific meaning.").

[18] *AT&T*, 841 F.3d at 1056.

[19] O1/Peerless's attempt to characterize YMax's VoIP arrangement as unusual is incorrect and misreads the *YMax Order*. *See* Pai Dissent at 1615, n.15. In particular, it is not true that AT&T "provided all of the equipment, facilities, configurations, and interconnections to YMax," or that "AT&T, not YMax, handed off the calls to other providers for completion." *Cf.* O1/Peerless Comments at 10-11. YMax operated typical over-the-top VoIP equipment (located in a rack in Dallas) in conjunction with (affiliated) partners—just as over-the-top VoIP providers do today. *YMax Order* ¶ 7.

### A. Because The 2011 Rules Have Always Been Clear—Apart From The Now-Vacated *Declaratory Ruling*—That End Office Switching Charges May Not Be Tariffed On Over-The-Top VoIP Calls, A Denial Of The Petition Will Apply Retroactively.

O1/Peerless argue that, if the Commission denies the CenturyLink Petition, and re-confirms that its 2011 rules prohibit end office switching charges on over-the-top VoIP calls, then the Commission's denial "should only apply prospectively," in order to avoid "wreaking havoc" on the industry. O1/Peerless at 12; *id.* at 12-17. This argument is fundamentally flawed, and should be rejected.

This proceeding, in which CenturyLink requests a declaratory order that would "terminat[e] a controversy," 47 C.F.R. § 1.2, is an adjudication, not a rulemaking, and "[r]etroactivity is the norm in agency adjudications." *AT&T v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006). Under the governing precedents, "retroactive effect is appropriate for new applications of [existing] law, clarifications, and additions," but not when an agency substitutes "new law for old law that was reasonably clear." *Verizon v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001) (*quoting Pub. Serv. Co. of Colo. v. FERC*, 91 F.3d 1478, 1488 (D.C. Cir. 1996)).

Under these standards, and as AT&T has explained, if the Commission were to grant CenturyLink's Petition, it would be substituting new law for old law that was reasonably clear, and thus any grant of the Petition would need to be prospective only.[20] As Chairman Pai explained in his dissent from the *Declaratory Ruling*, a "decision to allow LECs to collect end office switching charges when its VoIP partner transmits calls to an unaffiliated ISP for routing over the Internet alters our rules to mean something they've never meant before. . . . [The Commission]

[20] AT&T Comments at 27 n.18; *see also* AT&T 1/17/13 Ex Parte at 15-16; Letter from David L. Lawson, Counsel for AT&T, to Marlene H. Dortch, FCC, dated December 17, 2014 ("AT&T 12/17/14 *Ex Parte*").

cannot 'under the guise of interpreting a regulation, . . . create de facto a new regulation.' Nor can we change our rules without abiding by the [APA's] notice-and-comment requirements." Pai Dissent, at 1615, 1619 (*quoting Christensen v. Harris County*, 529 U.S. 576, 588 (2000)). Likewise, Commissioner O'Rielly explained that, in light of the Commission's 2011 rules and existing precedents interpreting the key terms in those rules, "the Commission cannot suddenly reverse its interpretations in the guise of a clarification and apply such 'clarification' retroactively." O'Rielly Dissent, at 1620.[21]

However, if the Commission were to deny the Petition, its determination would apply retroactively under governing law. That is because neither O1/Peerless nor any other entity can point to any "old law" that was "reasonably clear" (*Verizon v. FCC*, 269 F.3d at 1109) holding that LEC-VoIP partnerships could tariff end office switching charges on over-the-top VoIP calls. *See AT&T*, 454 F.3d at 332 (a party's claim that an agency adjudication cannot apply retroactively should ordinarily be rejected when it "does not and indeed cannot point . . . to a settled rule on which it reasonably relied."). Remarkably, the *only* "old law" to which O1/Peerless point in their favor is the now-vacated *Declaratory Ruling*. *See* O1/Peerless Comments at 13-14. However, the D.C. Circuit found the *Declaratory Ruling*'s rationale for allowing end office charges to be "muddled" and "wholly arbitrary," and the *Ruling* itself has been "vacated," *AT&T* 841 F.3d at 1053-54, 1056, which means "to annul; to cancel or rescind; to declare, to make, or to render, void;

[21] AT&T petitioned for review of the determination that the *Declaratory Ruling* applied retroactively. *See AT&T*, 841 F.3d at 1049. Because the Court found the *Declaratory Ruling* to be arbitrary, it did "not reach this issue." *Id.* However, in light of the Court's pronouncements, including that (i) parts of the *Transformation Order* "on their face" seem "to deny an over-the-top provider authority to charge end-office switching rates" (*id.* at 1054) and (ii) the Commission earlier in 2011 was "remarkably clear, even emphatic" in stating that end office switching charges were reserved for entities that "construct[ed] the tangible connections" to end users (*id.* at 1056), any similar claim that AT&T would raise in a subsequent petition for review would have a substantial likelihood of success.

to defeat; to deprive of force; to make of no authority or validity; to set aside." *Action on Smoking and Health v. CAB*, 713 F.3d F.2d 795, 797 (D.C. Cir. 1983) (*quoting* 91 C.J.S. Vacate (1955)). An order like the *Declaratory Ruling*—that was found to be muddled and arbitrary—cannot possibly establish "reasonably clear" law that end office charges apply on over-the-top VoIP charges.

In any event, under the precedents that O1/Peerless cite (at 12 & nn.36, 40), AT&T's challenge to, and the Court's vacatur of, the *Declaratory Ruling* means that no over-the-top providers could have reasonably relied on the *Ruling*. *Verizon*, 269 F.3d at 1110. As the D.C. Circuit explained in *Verizon*, parties cannot reasonably rely on a policy that was "never authoritatively articulated outside of the same complaint proceeding in which it was eventually reversed." 269 F.3d at 1110. In these circumstances, when an order like the *Declaratory Ruling* "not only ha[s] never been judicially confirmed, but w[as] under unceasing challenge before progressively higher legal authorities. . . . reliance is typically not reasonable, a conclusion that significantly decreases concerns about retroactive application of the rule eventually announced." *Id.* (citing *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1083 n.7 (D.C.Cir.1987) (en banc) ("[A] holding of nonretroactivity . . . cannot be premised on a single, recent agency decision . . . that is still in the throes of litigation when it is over-ruled."))[22]

[22] Two district courts issued rulings that over-the-top VoIP providers could tariff end office switching charges, but those rulings relied substantially on the *Declaratory Ruling*, and both district courts stayed or vacated their decisions after the D.C. Circuit's decision in *AT&T*. *See* Order, *Teliax, Inc. v. AT&T Corp.*, No 15-cv-01472-RBJ (D. Colo. Sept. 1, 2017) ("*Teliax Order*"); Orders, Docket Nos 202, 210, *Broadvox v. AT&T Corp.*, 8:13-cv-01130-PWG (D. Md. Nov. 18, 2016; Dec. 6, 2016). These district court cases cannot establish any reasonably clear law in O1/Peerless's favor, for the same reasons that the *Declaratory Ruling* cannot. In fact, in the former case, in vacating its initial order, the district court held that, in light of the vacatur of the *Declaratory Ruling*, "there is no longer *any authority* to suggest that, as a matter of law, the services Teliax provided constituted the 'functional equivalent' of end-office switching." *Teliax Order*, at 3 n.1 (emphasis added). In light of the court's conclusion that there is not "any authority"

Nor is there any merit to O1/Peerless's contention that retroactive application of a ruling denying the Petition would create "manifest injustice" or "wreak havoc" on the industry. *See* O1/Peerless Comments at 14-17. O1/Peerless argue that it would be "unjust to condemn or retroactively punish LECs" like O1, Peerless, and others, by requiring them to refund any end office charges that they have collected. *Id.* at 15-16. However, as AT&T and the D.C. Circuit have explained, the 2011 VoIP rules and the *Transformation Order* adopted existing terminology, incorporating decades of precedent on the meaning of key terms like "functionally equivalent" and "end office switching." AT&T Comments at 4-15, 16-20; *AT&T*, 841 F.3d at 1054-56; *see* Pai Dissent at 1615-19; O'Rielly Dissent at 1620-21. Accordingly, the law was clear that end office charges were *not* appropriate on over-the-top calls. *See id.* Over-the-top LECs like O1, Peerless, and others began billing end office charges on over-the-top VoIP calls long before the issuance of the *Declaratory Ruling*, and they did so in spite of the clear precedents as to meanings of the key terms in the Commission's 2011 rules. If anything, because the Commission's precedents and rules are clear, it would be manifestly unjust to grant the Petition on a retroactive basis. *See* AT&T Comments at 27 n.18; O'Rielly Dissent at 1621 (the carriers that did not pay the end office charges have "reasonably claim[ed] that the applicable rule was settled" in their favor); Pai Dissent, at 1615, 1619 (same).

In these circumstances, there is no manifest injustice to O1, Peerless or other over-the-top LEC-VoIP partnerships if they have to refund end office charges that they improperly billed and collected.[23] These carriers knew very early on that AT&T was disputing the end office charges—

in favor of O1/Peerless's position, it is impossible for O1/Peerless to meet the standards set out in *Verizon* and the other retroactivity cases.

[23] Notably, in its litigation with AT&T, O1 raised a very similar argument against retroactivity, and the Court rejected it. Indeed, O1 sought rehearing, and the Court denied the request without further briefing. *See* O1 Mot. for Reconsideration, Doc. No. 108, *O1 Commc'ns v. AT&T Corp.*,

and, given the precedents discussed, knew (or should have known) that any end office charges they billed or collected were at risk. For example, as to O1, the evidence gathered in its federal court litigation against AT&T establishes that AT&T began disputing O1's end office charges to AT&T as early as 2011, on the grounds that O1 was "not performing the end office function."[24] Indeed, even the *Declaratory Ruling* did not find that the law prior to 2015 was clear in favor of over-the-top providers like Peerless and O1—instead, the *Ruling* stated that there was "a lack of clarity regarding how the issue here ultimately would be resolved," and that "*all stakeholders* on this issue . . . have debated the interpretation of this rule actively, both in written ex parte filings and in-person meetings, nearly since the adoption of the VoIP symmetry rule." *Declaratory Ruling*, ¶ 49 (emphasis added). In these circumstances, O1/Peerless cannot possibly claim that they reasonably relied on their erroneous view of the law. *See, e.g.*, *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 540 (D.C. Cir. 2007).

Further, O1/Peerless's claim that denying the Petition retroactively "would create utter havoc" on the industry (at 16) is nothing but overblown rhetoric. If any LEC were seriously harmed because they could not collect (or had to refund) end office switching on over-the-top VoIP calls, that would be due to their own lack of foresight and improper business planning, and not any act of the Commission (or AT&T).[25] In fact, what is manifestly unjust would be a holding

No. 3:16-cv-01452 (N.D. Cal., filed Jan. 16, 2018) (arguing that the Court should reconsider its ruling that the decision in *AT&T* applies retroactively); Order, (ND. Cal., Jan. 24, 2018) ("The motion for leave to file a motion for reconsideration is denied.").

[24] *See* Ex. 11 to AT&T Corp.'s Cross-Motion for Summary Judgment, Doc. No. 87, *O1 Commc'ns v. AT&T Corp.*, No. 3:16-cv-01452 (N.D. Cal. Aug. 11, 2017).

[25] *See* Pai Dissent at 1619 ("it's *no surprise* that VoIP providers performing differing functions would entitle LECs to differing intercarrier compensation, nor that a VoIP provider that interconnects a call with a customer's last-mile facility performs the function of end office switching whereas a VoIP provider that transmits calls to an unaffiliated ISP for routing over the Internet does not") (emphasis added); O'Rielly Dissent at 1621 (allowing over-the-top providers to "pocket the difference" between end office and tandem charges "does nothing to guarantee that

that the 2011 VoIP rules prohibit end office charges on over-the-top calls, but nevertheless applying that holding only prospectively, thereby allowing O1, Peerless, and other over-the-top providers to retain (or even to file new actions to collect) end office switching charges—despite the fact they never have actually provided such services. *See Transformation Order*, ¶ 970; Pai Dissent at 1619; O'Rielly Dissent at 1621. That result would harm long distance carriers and their customers, which would be forced to pay excessive charges for services that they did not receive. *See Qwest*, 509 F.3d at 540-41 (it was arbitrary for the Commission to ignore that a finding of non-retroactivity "would inflict" an "equal and opposite loss" on the parties advocating for retroactivity").[26]

### B. Over-The-Top LECs Have Violated Their Own Tariffs By Billing End Office Charges, And AT&T Did Nothing Wrong In Disputing And Declining To Pay Charges For Services That Were Not Provided.

Both Teliax and O1/Peerless argue that AT&T and other IXCs have improperly engaged in "self-help" by failing to pay end office charges that the LECs billed on over-the-top VoIP calls. Teliax at 12-14; O1/Peerless at 18-20. According to Teliax and O1/Peerless, access customers are obliged to pay in full all invoices that the LECs bill, including end office charges, so long as the LECs have filed a tariff that has not been suspended. Teliax at 12-13; O1/Peerless at 18-19. These

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they will use [their revenues] to deploy IP networks. But it does promote artificial competition, marketplace distortions, and arbitrage.").

[26] There is also no merit to O1/Peerless's argument that it is unfair to require an over-the-top LEC "to issue refunds when refunds would not have been required if it provided its services via TDM technology." O1/Peerless Comments at 17. Under TDM architecture, it has been settled under the Commission's rules since at least 2004 that "the tandem switching rate" is applicable when "a competitive LEC passes calls between two other carriers." Eighth Report & Order, *Access Charge Reform*, 19 FCC Rcd. 9108, ¶ 21 (2004); O'Rielly Dissent at 1620 (the Commission "previously determined, over a decade ago, that carriers that merely pass calls to other carriers rather than placing them directly onto the loops of particular end users do not provide the functional equivalent of end office switching."). Thus, if O1 and Peerless and their retail partners had been using TDM technology, other (unaffiliated) entities would have switched the calls onto loops, and neither O1 nor Peerless could bill end office charges.

claims are meritless, disregard the Commission's precedents and the filed tariff doctrine, and should be rejected. In fact, these commenters' arguments are indistinguishable from claims made by competitive LECs in a complaint proceeding in 2011, which the Commission flatly rejected. *See All American v. AT&T*, 26 FCC Rcd 723 (2011).

#### 1. Access Customers May Properly Withhold Payment When Asserting That A Carrier Has Billed In Violation Of The Tariff.

Under the filed tariff doctrine, it is well-established that a carrier can properly bill and collect tariffed charges only if it demonstrates that (1) it has a valid, lawful tariff on file, and (2) it has "provide[d] its services in exactly the way the carrier describes them in that tariff."[27] For these reasons, a carrier that fails to provide services, exactly as specified by the tariff's terms, is *not* entitled to payment merely because it has a tariff on file and has billed the customer. The carrier must demonstrate that it provided service and properly billed for it, in compliance with the tariff,[28] and if a customer disputes that issue, then the Commission has held that the carrier cannot insist on payment as a condition of the dispute. *See, e.g.*, *Sprint v. No. Valley*, 26 FCC Rcd 10780, ¶ 14 (2011) (it is unreasonable for a carrier's tariff to require "all disputed charges to be paid," because such a term would "require[] everyone to whom [the carrier] sends an access bill to pay that bill, no matter what the circumstances (including, for example, if no services were provided at all)").

The Commission has further determined, as to access charges, that when a customer

[27] *CoreTel Va. v. Verizon*, 752 F.3d 364, 374 (4th Cir. 2014); *see also, e.g.*, 47 U.S.C. § 203(c) (barring a carrier from "enforc[ing] any classifications, regulations, or practices affecting" its tariffed charges, "except as specified" in the tariff); *YMax Order* ¶ 12 (under Section 203, "a carrier may lawfully assess tariffed charges only for those services specifically described in its applicable tariff."); *MCI Worldcom Network Services, Inc. v. Paetec Commc'ns Inc.*, 2005 WL 2145499, at *3 (E.D. Va. 2005) *aff'd*, 204 Fed. Appx. 271, 272 n.2 (4th Cir. 2006) ("[A] carrier is expressly prohibited from collecting charges for services that are not described in its tariff."); *Advamtel, LLC v. AT&T Corp.*, 118 F. Supp. 2d 680, 683 (E.D. Va. 2000).

[28] *See, e.g.*, *Tele-Valuation v. Am. Tel. & Tel. Co.*, 73 F.C.C.2d 450, ¶ 8 (1979) ("the primary responsibility for correct billings remains with the carriers").

withholds payment of a carrier's charges for tariffed access services, the customer's failure to pay does not violate any provision of the Communications Act. *All American v. AT&T*, 26 FCC Rcd 723 (2011) (citing multiple precedents). *If* the carrier proves that it provided the access services consistent with its validly filed tariff, then—at that point—the failure to pay could violate the tariff, but not the Act. *See id.* ¶ 10 (failure to pay "may give rise to a claim in court for breach of tariff/contract"). These Commission holdings further reinforce that nothing in the Act precludes an access customer from withholding payment when disputing a carrier's failure to provide service consistent with its tariff; instead, the customer's duties are governed by the tariff, and, as explained above, the Act and the Commission's order prohibit tariff provisions that entirely prohibit withholding.

The pre-1996 Act "self-help" cases at the Commission that O1/Peerless cite (at 17-18 & nn.52-53) involved entirely different circumstances, in which a customer did not contest either that the carrier had a valid and lawful tariff, or that the service was provided consistent with the tariff.[29] Rather, in those cases, the customer conceded receipt of the services described in the tariff, but invoked its statutory right under Section 201(b) to contest the reasonableness of a tariff rate or term. In that specific instance, where there is no dispute as to whether service was provided in compliance with the tariff, and the question is whether the rate is reasonable under the Act, the customer should pay the properly billed tariff rate, subject to its suit for refunds.[30]

[29] *See, e.g.*, *All American v. AT&T*, 26 FCC Rcd 723, ¶ 14 (the "'self-help' cases cited by the CLECs also are inapposite"); *see, e.g.*, *Business WATS, Inc. v. AT&T*, 7 FCC Rcd. 7942, ¶ 2 (CCB 1992) (rule against self-help applies to "duly performed" services provided under the "carrier's applicable tariffed charges"); *Brooten v. AT&T Corp.*, 12 FCC Rcd. 13343, n.53 (CCB 1997) (same); *In re MCI Telecomms. Corp.*, 62 F.C.C.2d 703, ¶ 6 (1976) (finding an obligation to pay for "properly billed" "services ordered pursuant to [a] tariff" that is "administratively valid").

[30] Further, these prior "self-help" precedents, including the cases relied on by O1/Peerless, have been expressly overruled to the extent they held that non-payment by a customer violated the Act. *See All American Order*, ¶ 20; *see* Recon Order, *All American v. AT&T*, 28 FCC Rcd. 3469, ¶ 6 &

### 2. **IXCs Properly Paid Only For The Tandem Services They Received, And Were Not Obligated To Pay For End Office Charges That Were Not Provided.**

Applying these principles here, O1/Peerless and Teliax are incorrect in arguing that over-the-top LECs can insist that IXCs pay end office charges on VoIP calls merely because the LECs have filed a tariff and billed IXCs for end office services. Under the LECs' tariffs, the filed tariff doctrine, and the Act, the LECs cannot collect, and IXCs need not pay, unless and until the LECs demonstrate that they provided end office services "in exactly the way the carrier describes them in th[e] tariff." *CoreTel Va.*, 752 F.3d at 374; 47 U.S.C. § 203(c). Because the over-the-top LECs have provided tandem services, rather than end office services, the tariffs and the Act preclude end office charges; the LECs' bills for end office charges *violate* their tariffs, and IXCs are not obligated to pay for end office services not provided pursuant to the LECs' tariffs. *See CoreTel Va.*, 752 F.3d at 374; *YMax Order*, ¶ 12.

In this regard, the tariffs of the LECs involved in over-the-top calls *do not* provide that they may charge and collect for end office switching on *all* over-the-top VoIP calls. Rather, those LECs—including Teliax and O1—filed tariffs that expressly incorporate the FCC's rules on VoIP calling. For example, these LECs have tariff provisions that define end office switching in substantially the same way that the Commission's rules define "End Office Access Service" (47 C.F.R. § 51.903(d)); these LECs' tariffs also include provisions that incorporate Section 51.913(b) of the Commission's rules, including the terms that "do not permit" a LEC-VoIP partnership from

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nn.13-14 (2013) (overruling several cases, including two cases cited by O1/Peerless: *Business WATS, Inc. v. AT&T*, 7 FCC Rcd 7942 (Comm. Car. Bur. 1992); *MCI Telecomms*. 62 F.C.C.2d 703 (1976)). *See also, e.g., Iowa Network Servs., Inc. v. Qwest Corp.*, 385 F. Supp. 2d 850 (S.D. Iowa 2005), *aff'd*, 466 F.3d 1091 (8th Cir. 2006) (rejecting the argument that impermissible "self-help" occurred when the services provided were not within the scope of the tariff).

"charg[ing] for functions not performed by the [LEC] itself or [its VoIP partner]." 47 C.F.R. § 51.931(b).[31]

In short, these LECs' tariffs are co-extensive with the Commission's VoIP rules, and because the Commission's rules prohibit end office charges on over-the-top VoIP, then so, too, do the terms of these LECs' tariffs.[32] Further, under the principles discussed above, in order for an over-the-top LEC to obtain payment of billed end office charges under its tariff, the LEC must demonstrate that on the over-the-top VoIP calls it provided end office switching—and not tandem services—under the tariffs and the Commission's VoIP rules. An IXC is not required to pay the tariffed end office charges on the over-the-top VoIP calls unless and until the carrier proves that it provided end office, and not tandem, services on such calls.

This is precisely how the District Court ruled in the *O1* case: it determined that the Commission's VoIP rules, in light of the decision in *AT&T*, precluded end office charges on over-the-top calls. It then determined that O1's tariffs were co-extensive with the Commission's rules, and on these grounds ruled that O1 could not collect end office charges under its tariffs, and at most could collect only tandem charges. The Court also rejected O1's argument that AT&T should have paid the end office rate pending the resolution of the dispute: "O1 appears to suggest that even if it improperly billed AT&T for end office access services when it was in fact providing

[31] *See, e.g.*, O1 Order on Summary Judgment, at 2-3 (O1's current FCC tariff "clearly requires O1 to provide end office access service as defined" in the FCC's rules and the "tariff's definition of end office switched access service adopts the FCC's definition of end office access service almost verbatim"); *Teliax Order*, at 8 ("the plain language of [Teliax's] tariff validly incorporated" the Commission's VoIP rules).

[32] If a LEC filed a tariff that purported to authorize it to bill and collect end office charges on over-the-top VoIP calls, even if that were prohibited by the Commission's rules, the tariff would be patently unlawful, as AT&T has explained. *See, e.g.*, Supp. Br. of AT&T, at 5-9, Doc. No. 100, *O1 Commc'ns v. AT&T Corp.*, No. 3:16-cv-01452 (N.D. Cal., filed Oct. 5, 2017) (attached hereto).

tandem access services, AT&T must nonetheless pay the higher end office rate. This is not the law." *See* O1 Order on Summary Judgment, at 3 (citation omitted).[33]

O1/Peerless rely on a decision in litigation between Peerless and Verizon, but that decision is flawed, and in conflict with the filed tariff doctrine, including the principles above. Mem. Opinion & Order, *Peerless Network v. MCI Comm.*, No. 1:14-cv-07417 (N.D. Ill. March 16, 2018). There, the court referred to the Commission the issue of whether, in light of *AT&T*, the Commission's VoIP rules permit end office switching on over-the-top VoIP calls, but granted Peerless's collection claim under its tariff, allowing it to collect end office charges. However, the Court granted the collection action claim *without even considering* whether Peerless had actually provided end office services within the meaning of its tariff—in flat violation of Section 203(c) and the precedents under the filed rate doctrine. This was plain error.

The Court determined that it should not decide whether the Commission's rules allowed Peerless to bill end office charges on over-the-top traffic, referring that issue to the Commission. But whether Peerless could lawfully charge end office services under its tariff is entirely dependent on the answer to that referred question. Peerless's tariff provides that "end office" services consist of the "local end office switching functions necessary to complete the transmission of Switched Access communications to and from the end users served by the local end office." *See* Peerless Network, FCC Tariff No. 4, § 6.1.2(B). This language appears more narrow than the

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[33] Moreover, consistent with the Commission's ruling in *Northern Valley*, 26 FCC Rcd 10780, ¶ 14, the LECs' tariffs should contain tariff provisions that allow customer to withhold disputed charges (often, these tariff provisions protect the carrier's interest by assessing late payment penalties (often at interest rates well above market rates)). AT&T and other IXCs did not violate the LECs' tariffs by withholding disputed charges when the LECs' tariffs should authorize withholding. The Commission has expressly held that an access customer could challenge a carrier's tariff and withhold payments where the carrier's "own Tariff expressly contemplates that a customer may withhold payment of disputed charges pending resolution of the dispute." *AT&T Corp. v. Beehive Tel. Co., Inc.*, 17 FCC Rcd 11641, ¶ 26 (2002).

Commission's VoIP rules, *cf.* 47 C.F.R. §§ 51.903(d); 51.913(b), but even assuming, *arguendo*, that Peerless's tariff could be read to be co-extensive with the Commission's VoIP rules, the Court did not determine (and could not have determined, *see supra* Part I) that Peerless provided "local end office switching functions," as required by its tariff.

The Court improperly framed the entire issue, assuming that what was at issue was whether an IXC could "declare Peerless's Tariff unlawful." Slip Op. at 34. However, neither the Court nor Verizon necessarily had to examine whether Peerless's tariff was unlawful or unreasonable.[34] The actual issue the Court should have considered was whether Peerless established, as a matter of law, that it provided end office services as specified in its tariff—in other words, whether Peerless *complied* with its tariff, not whether the tariff was unlawful. Because the question of whether, pursuant to its tariff, Peerless "provided local end office switching functions . . . to and from the end users" was similar to the issue referred by the Court, it erred in deciding that question, and in deciding that Peerless could collect end office charges under its tariff.[35]

[34] To the extent that Peerless was actually providing facilities-based VoIP services (or were to do so in the future), then the end office charges (assuming they are properly benchmarked) in the tariff would be appropriate. Only if Peerless's tariff were interpreted to be broader than the Commission's rules would the Court need to examine whether the tariff was lawfully filed. *See supra* note 31.

[35] The other case cited by O1/Peerless has no relevance here. O1/Peerless Comments at 19-20 (citing *Century Tel of Chatham v. Sprint*, 861 F.3d 566 (5th Cir. 2017)). In that case, the Fifth Circuit decided that when an IXC took the "extraordinary measure" of clawing-back money "it had already paid," such actions could violate Section 201(b). *Id.* at 577-78. In that case, the customer claimed it overpaid for service, and withheld payments in order to recoup the alleged overcharges. There is a substantial question as to whether this decision is in fact consistent with the Commission's Section 201(b) precedents, including its *All American* decision, which held that a customer-carrier's failure to pay access charges did not violate Section 201(b). But the Commission need not address that issue in this proceeding. Nor is there any allegation that AT&T took any "extraordinary measure[s]" and clawed back moneys that it had paid to over-the-top VoIP providers.

In sum, the Commission should flatly reject claims that access customers must pay billed end office charges even when an over-the-top LEC has not yet demonstrated (and, indeed, cannot demonstrate) that it actually provided end office services under the LEC's tariff. AT&T has not engaged in any improper "self-help." To the contrary, it has paid an appropriate tandem charge for the limited, intermediate routing service that a LEC-VoIP partnership provides on an over-the-top call, which is fully consistent with the Commission's rules and the filed tariff doctrine. 47 C.F.R. § 51.913(b) (the rule "does not permit" any "charge for functions not performed" by the LEC-VoIP partnership).

Respectfully submitted,

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Supplemental Brief of AT&T, Doc. No. 100, *O1 Commc'ns v. AT&T Corp.*, No. 3:16-cv-01452 (N.D. Cal., filed Oct. 5, 2017)

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**UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**
**SAN FRANCISCO DIVISION**

| | |
|---|---|
| O1 COMMUNICATIONS, INC.<br><br>*Plaintiff,*<br><br>v.<br><br>AT&T CORP.<br><br>*Defendant* | Case No. 3:16-cv-01452-VC<br><br>**SUPPLEMENTAL BRIEF OF DEFENDANT AT&T CORP.**<br><br>HONORABLE VINCE CHHABRIA |

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Pursuant to the Court's Order dated September 28, 2017, Defendant AT&T Corp. ("AT&T") respectfully submits this supplemental brief in support of its motion for summary judgment addressing the three questions in the Order.

**I. THE LANGUAGE OF O1's TARIFFS DOES NOT ALLOW IT TO CHARGE END-OFFICE SWITCHING RATES ON OVER-THE-TOP VoIP CALLS.**

The Court's Order asks the parties to assume that existing "FCC policy forecloses a conclusion" that O1's switching on over-the-top Voice over Internet Protocol ("VoIP") calls "is the functional equivalent of end-office switching" and to address whether the language of O1's tariffs nonetheless allows O1 to charge for end-office switching. The answer to the Court's question is an unambiguous "no." O1's tariffs do not allow for such charges, because the tariff language adopts the same "functional equivalence" test as found in FCC rules, and the tariff definition of end-office switching is virtually identical to that in FCC rules. Like the FCC's rules, O1's tariffs thus preclude O1 from charging AT&T end-office switching charges.

Two tariffs are implicated in this case – O1 Tariff No. 4 and O1 Tariff No. 3.[1] The relevant provisions of the FCC's rules are contained in 47 C.F.R. § 51.903, especially subsection (d), which defines "End Office Access Service," and in 47 C.F.R. § 51.913(b). As set forth below, and in the attached Appendix comparing the operative language of those FCC Rules and O1's tariffs, the language of the rules and the tariffs is virtually identical; and O1 is not allowed to charge AT&T for end-office switching under the tariffs. *See* App. A.

***O1 Tariff No. 4.*** O1's Tariff No. 4 tracks, virtually word-for word, both of these FCC rules. First, Section 3.3.2 defining the "End Office Category" of "Switched Access Service" in O1's Tariff No. 4 is *identical* to the FCC's definition of "End Office Access Service" in Rule 51.903(d), with only immaterial conforming changes. *See* App A. Under the FCC's definition and the one incorporated in O1's Tariff No. 4, a carrier does not provide End Office Access Service unless the carrier (1) switches and "deliver[s]" access "traffic to the called party's premises;" (2) "rout[es]" long distance "traffic to or from the called party's premises" either "directly" or via a

[1] O1's Tariff No. 4 became effective on May 10, 2014. Thus, O1's Tariff No. 3 governs charges between March 23, 2014 and May 10, 2014. Under 47 U.S.C. § 415(a), collection of unpaid charges prior to March 23, 2014 are time barred. *See* AT&T Mem., *O1 Commc'ns v. AT&T Corp.*, No. 16-cv-01452-VC, at 17-19 (Aug. 11, 2017).

VoIP provider partner; or (3) provides "any functional equivalent" of an incumbent local carrier's access service. *Compare* 47 C.F.R. § 51.903(d) *with* O1 Tariff No. 4, Section 3.3.2. O1 does not meet parts 1 or 2 of this definition because neither over-the-top VoIP carriers nor their VoIP provider partners switch and deliver (or route) traffic to or from the called party's premises. That final switching and routing is performed by the called party's broadband internet service provider. As assumed in the Court's first question in the Order (and in light of the D.C. Circuit's decision in *AT&T Corp. v. FCC*, 841 F.3d 1047 (D.C. Cir. 2016) ("*AT&T*") and existing FCC policy), O1 is not providing the "functional equivalent" of the incumbent local carrier end office access service. Accordingly, Section 3.3.2 of O1's Tariff No. 4, like the FCC's rules, does not allow O1 to bill end-office charges to AT&T.

Second, Section 3.8.4 of O1's Tariff No. 4 further confirms that O1 is not allowed under that tariff to charge for end-office switching. That section, entitled "Application of Access Charges to Toll VoIP-PSTN Access Traffic," tracks the language of the FCC rule in 47 C.F.R. § 51.913(b). *See* App. A. *Compare* O1 Tariff No. 4, § 3.8.4 ("The Company will not charge for functions not performed by the Company [or] its affiliated or unaffiliated provider of VoIP service.") *with* 47 C.F.R. § 51.913(b) ("This rule does not permit a local exchange carrier to charge for functions not performed by the local exchange carrier itself or the affiliated or unaffiliated provider of interconnected VoIP service or non-interconnected VoIP service."). Because, under the Court's assumption and existing FCC's rules and policies, neither O1 nor its VoIP partners perform the "functions" of end-office switching, the plain language of O1's Tariff No. 4 provides that O1 "will not charge" for end-office switching (or, in the words of the FCC, O1 is not "permit[ed]" to do so).

To the extent that O1 may point to other provisions of Tariff No. 4 as somehow allowing it to charge for end-office switching, those provisions do not allow it to do so. For example, although the initial few sentences of the definition of "switch" in Tariff No. 4 are broad, the final sentence – and the only one relevant here – confirms that O1 is not allowed to charge for end-office switching. That sentence provides "[s]witching is end office switching when the Company originates or terminates calls to End Users and tandem switching when the Company passes calls between two other Carriers." O1 Tariff No. 4, § 1, Original Page 10. That definition is identical to how the FCC has distinguished end-office and tandem switching in its 2004 and 2008 access charge orders. *See, e.g.*, *Eighth Report & Order*, 19 FCC Rcd. 9108, ¶ 21 (2004) (holding that the benchmark rate for competitive local carriers like O1 is "the end office switching rate when a competitive LEC originates or terminates calls to end-users and the tandem switching rate when a competitive LEC passes calls between two other carriers."); *Access Charge Reform*, 23 FCC Rcd. 2556, ¶ 6 (2008) (same). The sentence in Tariff No. 4 is thus fully consistent with AT&T's position that "end office switching occurs between a trunk line and the subscriber's line, while tandem switching occurs between trunk lines," and thus does not encompass the routing performed by O1 on over-the-top VoIP calls. *AT&T*, 841 F.3d at 1050.[2]

**Tariff No. 3.** O1's Tariff No 3, which was in effect for only the first six weeks of the relevant period, also does not allow O1 to bill end-office switching charges in the face of FCC's rules prohibiting it from doing so. Tariff No. 3 – like Tariff No. 4 – explicitly adopts the FCC's "functional equivalence" test for switching and otherwise incorporates the established distinctions between an end office and a tandem switch. Thus, it permits O1 to bill for end-office switching if and only if it provides the functional equivalent of that service.

In Section 5.1.1.1, O1 defines its switched access service to include "Tandem Switching" and "Local Switching." *See* O1 Tariff No. 3 § 5.1.1.1(a), (b). "Tandem Switching" is defined as "an intermediate switching function between the originating point of a Call and its final destination," which function "can be provided by a tandem switch or functionally equivalent equipment.") *Id.* § 5.1.1.1(a). Likewise, the definition of "Local Switching" in Tariff No. 3 incorporates the FCC's functional equivalence test. *Id.* § 5.1.1.1(b) (defining Local Switching as "the switching functionality closest to the Company's End User," which functionality "can be

[2] The definition of "Access or Access Service" in O1's Tariff No. 4 is no broader than the FCC's rules. *See, e.g.*, 47 C.F.R. § 69.2(b) (general definition of access service). The tariff definition expressly provides that "Access Service" (i) will be billed "pursuant to 47 CFR § 51.913," and (ii) will include "the functional equivalent" of the applicable incumbent carrier access services. O1 Tariff No. 4, § 1, Original Page 5; *cf*. 47 C.F.R. § 51.903(d)(3). In any event, nothing in this definition purports to authorize the billing of end-office (as opposed to tandem) "Access Service;" the specific charges for such "Access Service" are determined by other provisions in the Tariff, such as Sections 3.3.2 and 3.8.4, and as stated above those provisions do not authorize charges beyond those in the FCC's policies and rules.

performed by a switch or functionally equivalent equipment." O1's Tariff No. 3 thus incorporates the established distinction between end-office and tandem switching, with the former requiring the last-mile routing to or from the called (or calling) party's premises. And given the assumption in the Court's Order that O1 does not provide the functional equivalent of end-office switching, that is the end of the matter – O1 is not allowed to charge for that switching under Tariff No. 3.

To the extent O1 claims that its "switch" (which might be thousands of miles from the end user) is the "Local Switch[]" and provides "the switching functionality closest to the Company's End User," O1 does not provide that service. Rather, the switching functionality closest to the callers is provided by the callers' third party broadband internet providers, *not* O1 or its VoIP partners. *See, e.g.*, *AT&T*, 841 F.3d at 1051 (over-the-top VoIP requires callers to "obtain broadband transmission from a third party provider," and once the over-the-top carrier places the call on the public Internet, the third party provider "will then direct the data packets to the called party's customer premises equipment. . . ."). Thus, this portion of Tariff No. 3's definition of "Local Switching" does not allow O1 to charge for end-office switching.

Furthermore, even if it were possible to interpret this specific tariff language to allow O1 to charge for local switching when it does not provide that function, the Tariff does not clearly dictate that result. As such, that reading would at most make Tariff No. 3 ambiguous, and would not allow such charges. "[I]t is well established that any ambiguity in a tariff is interpreted against the party filing the tariff." *Halprin, Temple, Goodman & Sugrue v. MCI Telecomm. Corp.*, 14 FCC Rcd. 21092, ¶¶ 18-21, n.50 (re-affirming the Commission's view that MCI's charging practices were unjust and unreasonable under § 201(b) of the Act, in light of the "vague" and "inherently confusing" language in MCI's tariff that left customers unsure how they would be billed). Accordingly, the resulting ambiguity dictates the tariff be interpreted against O1 so as to not allow it to charge for end-office switching.

If this reading were advanced by O1, it would lead to an absurd result. Allowing O1 to charge for end-office switching when neither O1 nor its VoIP partners provide that service or its functional equivalent within the meaning of the FCC's rules would be absurd. *Eighth Report & Order*, ¶ 21 (the FCC's "long-standing policy" is that carriers may charge only for services they provide). As a consistent matter of tariff interpretation, "tariffs should be construed to avoid 'unfair, unusual, absurd or improbable results.'" *AT&T Corp. v. Alpine*, 27 FCC Rcd. 11511, ¶ 28 (2012) (quoting *Penn Cent. Co. v. General Mills*, 439 F.2d 1338, 1341 (8th Cir. 1986)). Thus, the terms in Tariff No. 3 should not be read to allow O1 to charge for end-office switching.

In sum, neither of the two tariffs implicated in this case allows O1 to charge for end-office switching when current FCC policy prohibits such charges.

## II. O1's TARIFFS WOULD NOT BE LAWFUL OR ENFORCEABLE IF THEY WERE INTERPRETED TO AUTHORIZE END-OFFICE SWITCHING ON OVER-THE-TOP VoIP CALLS.

The second question posed by the Court is whether, if O1's tariffs allow it to charge for end-office switching, the tariffs are illegal and should be declared as such. As an initial matter, because O1's tariffs do *not* allow O1 to bill and collect end-office switching charges, there is no conflict with the FCC's rules and policies. Accordingly, AT&T believes that the Court need not reach this question of tariff validity because it is O1's monthly billed end-office switching *charges*, not the *tariffs*, that are invalid.[3]

In that regard, this is akin to a facial versus an as-applied challenge. To the extent that O1's tariffs are consistent with the FCC's rules, they are valid on their face. Because, as an over-the-top VoIP carrier, O1 does not provide the functional equivalence of end-office switching, it cannot charge for that service under its tariffs (or FCC rules). If, on the other hand and contrary to fact, O1 were providing facilities-based (rather than over-the-top) VoIP services, then O1 could charge for end-office switching pursuant to its existing tariff (and FCC rules).

If this Court were to conclude that O1's tariffs allow it to charge AT&T for end-office switching when current FCC policy does not, then the tariffs would be unlawful and invalid and should be declared as such for at least two independent reasons.

*First*, a carrier's tariff cannot supersede the FCC's regulations or the Communications Act; instead, a tariff is subject to, and must be consistent with, the FCC's rules and the Act. *See, e.g.*,

[3] *See* 47 U.S.C. § 203(c) (entitled "Overcharges and rebates") ("no carrier shall [] charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect.").

*Global NAPS, Inc. v. FCC*, 247 F.3d 252, 259-60 (D.C. Cir. 2001) ("Merely because a tariff is presumed lawful upon filing does not mean that it is lawful"; rather, "[s]uch tariffs still must comply with the applicable statutory and regulatory requirements" and "[t]hose that do not may be declared invalid."); *PaeTec Commc'ns v. Commpartners*, No. 08-0397 (JR), 2010 WL 1767193 (D.D.C. Feb 18, 2010) ("a tariff cannot be inconsistent with the statutory framework pursuant to which it is promulgated."). In that regard, it is not surprising that O1's tariffs closely track the language of the FCC's rules.

In fact, when the FCC issued its rules that allowed tariffing for VoIP services and set the appropriate maximum rates, *see Connect America Fund*, 26 FCC Rcd. 17663, ¶¶ 933-45 (2011) ("*Connect America Order*"), it promulgated a regulation specifying that local carriers filing tariffs were "required to tariff rates no higher than" the transitional rates established by the FCC.[4] The FCC thus specifically directed local carriers to file tariffs that implement its VoIP rules, including 47 C.F.R. §§ 51.903(d), 51.913(b), which provide that local carriers are limited to charging for the "functional equivalent" of incumbent carriers' access service, and are "not permit[ted] . . . to charge for functions not performed" by the local carrier or its VoIP partner. It is disingenuous for O1 to contend that it may nonetheless lawfully file a tariff that authorizes charges that the FCC's rules prohibit. Indeed, there would be little point to the FCC's VoIP rules and policies if local carriers could simply elect to depart from the rules unilaterally by filing tariffs with higher rates than those set by the FCC.[5] Thus, to the extent a local carrier's tariff purported to authorize higher priced local switching charges on over-the-top calling, that tariff would conflict with the FCC's regulations and would be invalid.

[4] 47 C.F.R. § 51.905(b)-(1) (local carriers "who are otherwise required to file tariffs are required to tariff rates no higher than the default transitional rates specified by this subpart. With respect to interstate switched access services governed by this subpart, LECs shall tariff rates for those services in their federal tariffs."). The FCC's VoIP rules, including 47 C.F.R. § 51.903(d) and § 51.913(b), are part of the FCC's "default transitional rules." *See id*. §§ 51.901-51.919.

[5] It is no answer to say that the FCC could suspend such tariffs before they became effective. There are thousands of local carriers, and the FCC has only fifteen days to suspend a tariff before it goes into effect. *Commpartners*, at *4. If unsuspended tariffs could supersede valid FCC regulations, that "would create incentives to bury within tariffs provisions that expand their rates beyond statutory allowance in the hope that the FCC will not notice." *Id.* Tariff filings are intended to ensure definite and clear rates and to prevent discrimination, and were never intended to be wielded by carriers as a sword to justify violations of the FCC's rules.

*Second*, the same result is also compelled by a separate set of rules that predates the 2011 *Connect America Order*, which the FCC promulgated in 2001 regarding tariffing of any interstate switched access services by competitive local carriers like O1. In those 2001 rules, the FCC eliminated tariff filing requirements for competitive local carriers to prevent competitive local carriers from filing lawful tariffs with rates that exceeded FCC-specified "benchmarks," which are based on the rates of incumbent local carriers for "functional[ly] equivalent" service.[6] As a result, if a local carrier were to file a tariff that purported to charge higher local switching rates even when it provided only the functional equivalent of lower-priced tandem services, the local carrier's tariff would violate these rules and would be invalid.[7] In short, the FCC has already addressed and precluded competitive local carriers from lawfully filing tariffs that purport to authorize charges that exceed the maximum rates determined by the FCC's rules and policies.

The FCC explained the operation of these rules in a recent case in which it found a carrier's tariff with rates that exceeded the relevant FCC benchmark to be unlawful and "void." *Great Lakes Comnet*, ¶¶ 28-29. The FCC explained that, for a competitive local carrier, an access rate in excess of the benchmark is "subject to mandatory detariffing."[8] Under mandatory detariffing

[6] 47 C.F.R. § 61.26; *Seventh Report & Order*, 16 FCC Rcd. 9923, ¶¶ 2-3, 30-34, 40, 82-87 (2001); *AT&T Servs. Inc. v. Great Lakes Comnet*, 30 FCC Rcd. 2586, ¶ 10 (2015) ("*Great Lakes Comnet*") (describing benchmark rules), *aff'd in relevant part, remanded in part, Great Lakes Comnet, Inc. v. FCC*, 823 F.3d 998 (D.C. Cir. 2016). *See also, e.g.*, *Qwest Commc'ns Corp. v. N. Valley Commc'ns*, 26 FCC Rcd 8332, ¶ 8 (2011) ("*Northern Valley*") (the FCC's "rules require that tariffed [competitive local carrier] charges for 'interstate switched exchange access services' be for services that are 'the functional equivalent' of [incumbent local carrier] interstate switched exchange access services."), *aff'd*, *N. Valley Commc'ns v. FCC*, 717 F.3d 1017 (D.C. Cir. 2013). The "functional equivalent" standard that the FCC adopted for competitive local carriers' access charges is the same standard in the FCC's VoIP calling rules. *See, e.g.*, Pai Statement, 30 FCC Rcd. at 1615 & n.3.

[7] For example, when an incumbent carrier's rate for tandem switching services is $0.0006 per minute, the competitive carrier may not lawfully file a tariff with a rate above $0.0006 for any access service functionally equivalent to tandem switching. If a competitive local carrier wants to charge rates that exceed that the incumbent local carrier's charges for functionally equivalent service, the competitive carrier must negotiate a contract with the long distance carrier. *Seventh Report & Order*, ¶¶ 40, 82.

[8] *Id.* ¶ 28. In Section 160 of the Act, Congress instructed the FCC to "forbear" from applying provisions of the Communications Act or the FCC's rules when the FCC found specified criteria to be met. 47 U.S.C. § 160. Although Section 203 of the Act ordinarily requires common carriers to file tariffs for regulated service, *see* 47 U.S.C. § 203(a), the FCC has invoked its forbearance authority to forbid the filing of tariffs for competitive local carrier access services that are priced above the applicable benchmark. *See Seventh Report & Order*, ¶¶ 82-87. The FCC uses the term "mandatory detariffing" to refer to forbearance that forbids tariff filing.

in the FCC's benchmark rules, "a carrier is prohibited from filing a tariff with rates above the benchmark; doing so violates the Commission's Rules and renders the prohibited tariff void *ab initio*." *Great Lakes Comnet*, ¶ 28. The FCC held that the benchmark rule applicable to the case was specified in 47 C.F.R. § 61.26(f), and that the carrier's charges violated that benchmark because its tariff charges exceeded the charges of the incumbent carrier "for the same functions." *Great Lakes Comnet*, ¶ 29. The local carrier's tariff "did not comply with Section 61.26(f) when GLC filed it; accordingly, the tariff is void *ab initio*." *Id.* (footnote omitted).

The same result would apply here if O1's tariffs were construed to authorize O1 to bill higher-priced end-office switching charges for providing the functional equivalent of tandem switching. As in *Comnet*, the relevant benchmark for O1's access services is specified in 47 C.F.R. § 61.26(f). That rule applies to a competitive local carrier when it provides only "some portion" of the access service used to complete a call, and specifies that the competitive local carrier's tariffed rate in such cases "should be no higher than the rate charged by the competing incumbent LEC *for the same functions*."[9] Under the Court's assumption that O1 is not providing the functional equivalent of end-office switching, O1 could not lawfully file a tariff with end-office rates – O1 is limited to tariffing the lower tandem rate. Thus, if O1's tariffs were construed to authorize higher end-office switching charges (about $0.006 per minute) when O1 provided only tandem functions (priced at about $0.00066 per minute), O1's tariffs would not comply with the FCC's benchmark rules when filed. In that instance, where a carrier's tariff purports to authorize charges that the FCC's rules and policies prohibit, the Court can and should find that the tariff is inconsistent with federal law and invalid. *Commpartners*, at *4 (the "tariff must give way" because the unlawful terms "were simply *ultra vires* and lacked legal force"); Brief for Amicus Curiae FCC, *Paetec Commc'ns v. MCI Commc'ns*, Nos. 11-2268 & 11-1204, 2012 WL 992658, at *25 (3d Cir. Mar. 14, 2012) ("*FCC PaeTec Amicus Brief*") (a tariff that is unlawfully filed under the FCC's benchmark rules should be declared "void *ab initio*").

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[9] *Eighth Report & Order*, ¶ 14; 47 C.F.R. § 61.26(f) (where a competitive carrier provides only a portion of the access services, "the rate for the access services provided may not exceed the rate charged by the competing ILEC for the same access services. . . .").

## III. AT&T IS ENTITLED TO DECLARATORY, PROSPECTIVE, AND RETROACTIVE RELIEF, INCLUDING DAMAGES, INTEREST AND FEES.

The Court's final question is, if the tariffs authorize the higher end-office charges while FCC policy does not, what relief is available to AT&T? At the outset, AT&T believes that because O1's tariffs (like the FCC's rules) do not authorize local switching charges on over-the-top calling, AT&T is entitled to (1) declaratory relief that O1 may only charge the applicable tandem switching rate, not the end-office switching rate, on over-the-top calls; (2) prospective relief that O1 may not charge for end-office switching on over-the-top calls; and (3) damages for the amounts O1 collected in excess of the lawfully permissible tandem charges, plus interest and attorneys' fees. Under the Communications Act, a customer is entitled to a refund of overcharges when the carrier collects a higher charge than the rate specified in the tariff. 47 U.S.C. §§ 203(c), 206, 415(c). Here, O1's tariffs and FCC rules limited O1's charges to the tandem rates, which were about $0.00066 per minute, and O1 must refund the amounts that AT&T paid "for services in excess of those applicable thereto under the schedules of charges lawfully on file." *Id.* § 415(g).

With respect to the specific question asked by the Court, to the extent that O1's tariffs could be interpreted to allow it to bill the higher-priced end-office switching charges on over-the-top calling, AT&T still would be entitled to both the prospective and retroactive relief, as well as a declaration that the O1's tariffs were not lawfully filed and are unenforceable. As set forth above in Part II, O1 cannot lawfully file tariffs with rates that exceed those permitted by the FCC's rules. 47 C.F.R. § 61.26; *Id.* § 51.905(b). If O1's tariffs were interpreted to allow O1 to bill end-office switching rates when providing the functional equivalent of lower-priced tandem services, O1's tariffs would be void *ab initio*. In that instance, O1 would lack any validly filed tariffs, and it could not have lawfully charged AT&T *any* tariffed access services.[10] Because O1, lacking a valid

[10] Under the Communications Act and the FCC's access charge regulatory regime, a competitive carrier can only recover access charges pursuant to "valid interstate tariffs under Section 203" or negotiated contracts. *See, e.g.*, *AT&T Corp. v. All Am. Tel. Co.*, 28 FCC Rcd. 3477, ¶ 37 (2013); *Northern Valley*, ¶ 6. Under the scenario described above, O1 would not have a valid tariff (and there is no negotiated contract between O1 and AT&T). Thus, O1 could not have properly billed anything to AT&T, even for tandem switching charges. *See, e.g.*, *Security Servs. v. K Mart Corp.*, 511 U.S. 431, 444 (1994) (carriers "may not collect for undercharges based on filed, but void, rates."); *Union Tel. Co. v. Qwest Corp.*, 495 F.3d 1187, 1193-94 (10th Cir. 2007) ("Because [a carrier] failed to file []rates" for its cellular operations, which was required under state law, the carrier "is precluded from receiving terminating access charges for cellular calls until such tariffs are properly filed"); *In re Americana Expressways*, 133 F.3d 752, 758 (10th Cir. 1997) (a carrier

tariff, could not have lawfully billed any tariffed charges, AT&T would be entitled to a refund of *all* of the amounts it paid O1, not merely the refund of the overcharges based on the lower tandem rates. This is the proper result even though O1 purports to have filed its tariffs pursuant to 47 U.S.C. § 204(a)(3), under which tariffs can become "deemed lawful."

The FCC made this point clear in an amicus brief in a Third Circuit case that settled after that *amicus* was filed.[11] The Third Circuit requested the FCC to file an amicus brief that addressed, *inter alia*, the following question: "Whether a [competitive local carrier's] switched access tariff, filed on a 'streamlined' basis pursuant to 47 U.S.C. § 204(a)(3) but subsequently found to violate the FCC's benchmark, can enjoy 'deemed lawful' status? Or, is that tariff subject to the mandatory detariffing rule announced in the *Seventh Report and Order*, 16 FCC Rcd. 9923 (2001)?" *FCC PaeTec Amicus Brief*, at *2. The FCC responded that "the answer is no to the first question, and yes to the second question."

The FCC's brief further explained why competitive carriers' tariffs filed in violation of the FCC's rules were void and not entitled to "deemed lawful" status (using the same rationale the Commission later adopted in *Great Lakes Comnet*, *supra*):

> A CLEC tariff for interstate switched access services that includes rates in excess of the benchmark in Rule 61.26 is subject to mandatory detariffing. Under that regime, a carrier is *prohibited* from filing a tariff; any attempt to do so would violate the FCC's rules and render the prohibited tariff *void ab initio* if filed with the Commission. *Cf. Global NAPS, Inc. v. FCC*, 247 F.3d 252, 259-60 (D.C. Cir. 2001) ("Merely because a tariff is presumed lawful upon filing does not mean that it is lawful"; rather, "[s]uch tariffs still must comply with the applicable statutory and regulatory requirements" and "[t]hose that do not may be declared invalid."). Thus, such a tariff cannot benefit from "deemed lawful" status pursuant to section 204(a)(3) of the Act.

*Id.* at *25. As the FCC's brief explained, and as discussed above, in its 2001 rules, the FCC decided to forbear from "the enforcement of [the FCC's] tariff rules and the Act's tariff requirements for

with "no filed rate" because it failed to comply with rules requiring it to adopt prior tariffs or file new tariffs "has no basis for an undercharge suit."). And O1 could not seek to rely on the tandem rates in the incumbent tariff. *Hypercube v. Comtel Telcom Assets*, No. 3:08-cv-2298-G, 2009 WL 3075208, at *4 (N.D. Tex. Sept. 25, 2009) (a carrier "cannot – as a matter of law" recover fees when it has no tariff of its own on file and tries to rely "on a tariff that does not belong to it").

[11] Courts may appropriately defer to the position of the FCC articulated in an amicus brief. *See Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2261 (2011) (deferring to an FCC rule interpretation contained in amicus brief).

[competitive local carriers'] access services priced above [the FCC] benchmark." *Seventh Report & Order*, ¶ 82. Because Section 204(a)(3) is one the Act's tariff requirements, the "deemed lawful" protections in that Section cannot apply to competitive local carriers' tariffs that are filed with above-benchmark rates. *FCC PaeTec Amicus Brief*, at *26. In fact, precluding such tariffs from obtaining deemed lawful status was one of the purposes of the 2001 rules. *Id.* The FCC's brief further explained that, although it could suspend unlawful tariffs before they become effective, adopting de-tariffing for above-benchmark rates "prohibit[s] those presumptively unreasonable rates from being tariffed in the first [place]" and "better serves the public interest." *Id.* at 27-28. As the FCC explained, if a district court "were to find that a [competitive local carrier's] access tariff that includes rates exceeding the benchmark can enjoy 'deemed lawful' status, it would undermine the mandatory detariffing regime imposed by the FCC." *Id.* at *28.

Under the FCC's rules, therefore, if O1's tariffs were interpreted to authorize the higher local switching charges even though the FCC's rules and policies do not, then O1's tariffs would violate the FCC's detariffing rules and would be "void *ab initio*." *Id.* at *25. O1's void tariffs could not benefit from "deemed lawful" status, *id.*, and thus AT&T would be able to obtain both retroactive, prospective, and declaratory relief. AT&T would not owe any local switching charges to O1 (or any charges at all), because O1 did not ever have a lawful tariff on file that would have allowed O1 to bill those local switching charges on over-the-top calls.[12] Accordingly, if O1's tariffs did purport to authorize local switching charges that violated the FCC's rules and were void, AT&T would be entitled to additional relief: O1, lacking a valid tariff or negotiated contract with AT&T, could collect nothing for any services, and it would need to repay (along with interest and fees) all of the amounts that AT&T paid to O1 within the limitations period of March, 2014.[13]

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[12] Although the FCC's *Declaratory Ruling*, if valid, would have permitted carriers to file tariffs authorizing charges for local switching, the *Ruling* was vacated and thus "annul[led]" and "render[ed] void." *AT&T*, 841 F.3d at 1056; *Action on Smoking and Health v. CAB*, 713 F.2d 795, 797 (D.C. Cir. 1983). O1 Tariff Nos. 3 and 4 were filed prior to the issuance of the *Ruling*, and thus O1 has no valid argument that it relied on the *Ruling* in filing tariffs that (like the *Ruling* itself) would be voided to the extent they violate the FCC's rules.

[13] This result is not unfair to the carrier, and applies because as to filed tariffs, "carriers cannot have it both ways." *Security Servs*., 511 U.S. at 440. If a competitive local carrier wants to file a tariff with terms it unilaterally drafts (rather than negotiate a contract with mutually agreeable terms), then it is more than reasonable to require the carrier to draft tariff terms that comply with applicable FCC rules and policies. If it does not, the carrier assumes the risk. And, the carrier

## IV. CONCLUSION

For the foregoing reasons and for the reasons in AT&T's prior briefs, AT&T's motion for summary judgment should be granted and O1's motion should be denied.

Respectfully submitted,

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could easily mitigate that risk by negotiating a contract, or by including in its tariffs provisions that unambiguously provide that nothing in the tariffs is intended to allow charges of rates higher than those permitted by the FCC's rules. Instead, all too often, competitive carriers have abused the tariff filing process. *See, e.g.*, *Seventh Report & Order*, ¶ 2.